IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MATTHEW W. SMITH, COMPANY, INC., Respondent,	No. 37541-9-II
v.	UNPUBLISHED OPINION
DONALD C. CHILL, a married man, Appellant.	

Van Deren, C.J. — Donald C. Chill appeals the trial court's decision affirming an arbitration award and the trial court's writ of execution on Chill's interest in community property, claiming that (1) the arbitration panel that heard Mathew Smith Company's claim for rescission of the stock purchase agreement for violation of the Washington State Securities Act did not have jurisdiction to cancel the associated agreements and (2) the trial court erred in allowing Chill's one half interest in community property to be used to satisfy the arbitration award. We affirm the trial court's confirmation of the arbitration award because we may not review the arbitration panel's decision based on evidence before it relating to consideration for the stock purchase agreement. We also affirm the writ of attachment on Chill's interest in community property because a securities act violation in this instance is a tort and a tortfeasor's one half interest in

community property may be available to satisfy a judgment against the tortfeasor.

FACTS

On December 12, 2006, Donald Chill entered into a preliminary agreement to sell all of the stock of Charles Prescott Restoration, Inc. (Charles Prescott Restoration) to the Matthew Smith Company, Inc. (Matthew Smith Co.). The terms of the preliminary agreement were contained in a document titled "Counter Offer to Purchase and Earnest Money Agreement." Clerk's Papers (CP) at 247. This agreement anticipated a sale of 100 percent of the Charles Prescott Restoration stock. It stated that that the business assets and property, at the time held by another entity, were to be included in any final sales agreement. It established a $4 million purchase price. One condition of the sale was an 84 month compensation package for Chill. The preliminary agreement did not contain an arbitration clause.

On January 3, 2007, the parties entered into a "Compensation Plan for Earn-out Agreement." CP at 253. It addressed the contingency in the preliminary agreement related to the "Earn-out Payment structure" for Chill. CP at 253. In relevant part, the contract provided for payment of $1 million in monthly installments of $12,940 to Chill, such payment obligation set forth in a promissory note, payment of an annual salary and benefits to Chill, and an agreement that Chill would assist Smith with marketing for a minimum of 18 months. The compensation agreement did not contain an arbitration clause.

The stock purchase closed on May 23, 2007. The ultimate buyer was Matthew Smith Co. The stock purchase transaction involved various steps and agreements, all of which were executed and signed on the same day. First, the parties signed a stock purchase agreement (SPA). The SPA covered the sale of stock shares in Charles Prescott Restoration to Matthew Smith Co.

Payment of the purchase price of $4 million comprised: (1) a payment of $2,150,000 at closing; (2) credit for the $50,000 in earnest money; and (3) two promissory notes--one for $1,300,000 and a second for $500,000. The SPA reiterated that one condition of closing was an executed employment agreement between Matthew Smith Co. and Chill. The SPA contained an arbitration provision providing that the parties agreed to arbitrate "any controversy or claim arising out of this Agreement." CP at 48.

Smith also signed a loan agreement with Wachovia Bank for $1 million. The parties executed an employment agreement between Charles Prescott Restoration, purchased by Matthew Smith Co., and Chill. Smith delivered the two promissory notes indicated in the stock purchase agreement to Chill. Charles Prescott Restoration and the Matthew Smith Co. entered into a commercial lease. Smith executed the $1 million promissory note that was to be paid in monthly installment in compliance with the terms of the earn-out agreement of January 9, 2007.[1] Finally, Smith and Chill executed an agreement giving Chill the right to certain of Charles Prescott Restoration's outstanding accounts receivable as of the date of closing.

. About six months later, on June 28, 2007, Matthew Smith Co. sent Chill its notice of intent to arbitrate rescission of the SPA. Matthew Smith Co. later informed Chill that its claim in arbitration would be asserting violations of the Washington State Securities Act (WSSA). RCW 21.20.

On July 9, 2007, Chill sued the Matthew Smith Co. seeking damages for Matthew Smith Co.'s failure to make payments on the $1 million promissory note, breach of his employment

[1] Chill states that Smith did not execute or deliver this note until after the closing officers left the room.

agreement, and claims related to the accounts receivable agreement. Matthew Smith Co. answered the lawsuit and asserted counterclaims.[2]

The parties engaged in a three day arbitration hearing that was completed on December 6, 2007. Chill's arbitration brief included discussion and argument relating to the $1 million promissory note, which, at that time, he included in the purchase price.

On December 19, 2007, the arbitrators issued an order finding that Chill violated the WSSA and granting rescission of the SPA. On January 8, 2008, Matthew Smith Co. requested a written final award that included cancellation of the $1 million promissory note. On January 27, the arbitrators' final award cancelled the "$500,000 note, the $1,300,000 note and the $1,000,000 note." CP at 103. It rescinded the stock purchase agreement and "[a]ll contracts between plaintiff and defendant that were entered in connection with the" agreement. CP at 103-04. It also stated:

> The panel is aware that litigation is pending in Superior Court on the $1,000,000 note. The panel has concluded that it has jurisdiction to cancel the . . . note, but does not intend to foreclose any right the defendant may have to have the court determine this jurisdictional issue.

CP at 104.

Matthew Smith Co. moved in superior court to confirm the arbitration award. Chill moved to modify or vacate the award. While the parties' motions were pending in the superior court, Matthew Smith Co. filed a motion seeking a writ of attachment against Chill's properties in this state. The motion alleged that the earnings of Charles Prescott Restoration were generated by fraudulent billing and claims adjustments orchestrated by Chill and an employee of a

[2] We learned at oral argument that the lawsuit did not proceed because the parties had to prepare for the arbitration and that, after the arbitration, they believed that all of the claims had been resolved through arbitration.

homeowners insurance company. It stated that, after Matthew Smith Co. sought arbitration, Chill invested $1.8 million in a house in Florida, tried to establish residency in Florida, and entered into contracts to sell his properties in this state.

In February 2008, the trial court (1) granted Matthew Smith Co.'s motions to confirm the arbitration award and for a writ of attachment on Chill's Washington properties and (2) denied Chill's motion to vacate the arbitration decision. Chill unsuccessfully moved for reconsideration. The trial court then entered findings and conclusions to support entry of judgment without delay.

Chill appeals the confirmation of the arbitration award and the issuance of the writ of attachment.

ANALYSIS

I Confirmation of the Arbitration Award

A. Applicable Statutes

RCW 7.04A.230[3] and RCW 7.04A.240[4] govern this appeal. They address a

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[3] RCW 7.04A.230(1) states in pertinent part:

> Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:
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> . . . .
>
> (d) An arbitrator exceeded the arbitrator's powers; [or]
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> (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing[.]

[4] RCW 7.04A.240(1) states in pertinent part:

> Upon motion filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, the court shall modify or correct the award if:
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> . . . .
>
> (b) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted[.]

court's power to review or modify an arbitration decision and they impose a strict timeline for challenges to the arbitrator's jurisdiction and appeal from arbitration decisions.

B. Standard of Review and Reviewability

Chill contends, citing *Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.*, that we review de novo the intended scope of an agreement to arbitrate based on the argument that "whether and what the parties have agreed to arbitrate is an issue for the courts to decide unless otherwise stipulated by the parties." 138 Wn. App. 203, 213, 156 P.3d 293 (2007), *review granted*, 163 Wn.2d 1011 (2008). *See also Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 163 P.3d 807 (2007), *review granted*, 163 Wn.2d 1033 (2008).[5]

Matthew Smith Co. argues that courts have no power to overturn the arbitration award as Chill suggests because the "determination whether the multiple agreements constituted a single indivisible contract was a question for the arbitrator," Br. of Resp't at 13, and the courts have no basis to disturb the award because "'the face of the arbitral award alone does not exhibit an erroneous rule of law or mistaken application of law.'" Br. of Resp't at 13 (quoting *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995)). We agree with Matthew Smith Co.

In *Boyd*, the parties entered into an agreement to transfer an ophthalmology practice. The transfer involved five different contracts. *Boyd*, 127 Wn.2d at 258. In arbitration, instead of voiding all five agreements as one party requested, the arbitrator voided a single agreement. The trial court subsequently determined that the parties' five contracts constituted a single unseverable contract. On appeal, our Supreme Court held that the trial court could not try the case de novo to determine what type of contractual arrangements the parties had intended. *Boyd*, 127 Wn.2d at

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[5] Our Supreme Court dismissed both cases without opinion.

261-62.[6]

Thus, *Boyd* characterizes whether the parties intended separate agreements to function as one overarching agreement as an issue of fact because resolution depends on the parties' intent. *Tacoma Narrows Constructors*, on which Chill relies, characterizes the issue of whether the arbitration clause in one contract covers matters in other contracts as a jurisdictional issue, that is, as a matter of law. 138 Wn. App. at 213-15.

Courts generally cannot review an arbitration award if it turns on an examination of the facts but they may review matters of arbitrator jurisdiction. "In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified." *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). "Ordinarily the evidence before the arbitrators will not be considered by the court." *Davidson,* 135 Wn.2d at 119; *see also* RCW 7.04A.240.

Here, the trial court's opinion, while it frames the issue as jurisdictional, clearly addresses the evidence at the arbitration proceeding, which "revealed that the . . . note, and other contracts between the parties were consideration for the Stock Purchase." The trial court concluded that, because the arbitrators "had jurisdiction to adjudicate the dispute arising out of the" stock purchase agreement, the arbitrators could order the return of "all consideration." CP at 677 (emphasis omitted).

Neither party disputes the arbitrators' jurisdiction to rescind the SPA. If Matthew Smith

[6] Chill argues that *Boyd* is distinguishable because, unlike here, all the contracts in *Boyd* contained arbitration provisions. *Boyd v. Davis*, 75 Wn. App. 23, 27, 876 P.2d 478 (1994), *aff'd*, 127 Wn.2d 256 (1995). We do not find this argument persuasive. The controlling issue is whether the parties intended the $1 million note to serve as consideration for the SPA, which contained an arbitration clause.

Co. executed the $1 million promissory note as consideration for that agreement, the remedy of rescission required the arbitrators to annul the note. Recission involves restoration to the status quo, including the return of "consideration given and received." *Hall v. Nordgren*, 196 Wash. 68, 73, 81 P.2d 857 (1938); *see also Morango v. Phillips*, 33 Wn.2d 351, 357, 205 P.2d 892 (1949).

Whether the parties intended the $1 million promissory note to serve as consideration for the stock purchase agreement, therefore, appears to fall squarely within *Boyd*:

> Whether separate agreements are in fact part of one transaction *depends upon the intention of the parties* as evidenced by the agreements. *Don L. Cooney, Inc. v. Star Iron & Steel Co.*, 12 Wn. App. 120, 122, 528 P.2d 487 (1974).
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> > "Whether a contract is entire or divisible depends very largely on its terms and on the intention of the parties disclosed by its terms. As a general rule a contract is entire when by its terms, nature and purpose, it contemplates and intends that each and all of its parts are interdependent and common to one another and to the consideration."
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> (Footnote omitted.) *Saletic v. Stamnes*, 51 Wn.2d 696, 699, 321 P.2d 547 (1958) (quoting *Traiman v. Rappaport*, 41 F.2d 336, 338 (3d Cir.1930)).

127 Wn.2d at 261 (emphasis added). Because the trial court reviewed the evidence before the arbitrators about the consideration underlying the stock sale, the trial court erroneously conducted a de novo trial of this issue. *Boyd*, 127 Wn.2d at 262-63.

The arbitration scheme does not permit courts to "'determine the underlying merits of a dispute in determining the arbitrability of an issue.'" *Tacoma Narrows Constructors*, 138 Wn. App. at 214 (quoting *W.A. Botting Plumbing & Heating Company v. Constructors-Pamco*, 47 Wn. App. 681, 683, 736 P.2d 1100 (1987)). Consequently, because "the face of the arbitral award alone does not exhibit an erroneous rule of law or mistaken application of law," *Boyd*, 127 Wn.2d at 263, the trial court should not have conducted any review of "the evidence in the arbitration hearing." CP at 677. The trial court "cannot search the four corners of the contract

to discern the parties' intent." *Boyd,* 127 Wn.2d at 263. "Ordinarily the evidence before the arbitrator will not be considered by the court." *Davidson*, 135 Wn.2d at 119. But we can affirm the trial court's confirmation of the arbitration award on any basis the record supports. *See generally LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

Matthew Smith Co. also presents a second compelling reason why the arbitrators' decision is unreviewable: Chill's challenge goes solely to the remedy the arbitrators ordered; it does not challenge the arbitration panel's authority to rule on Matthew Smith Co.'s claim under the WSSA.[7] Matthew Smith Co. notes that RCW 7.04.240(1)(b) allows a court to modify an arbitration award when an "arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted."

> The *claim* that was submitted to the arbitrators was based on the Securities Act, and that is the *claim* that the arbitrators resolved. The award was based on that *claim*. Because the arbitrators made an award on the *claim* that was submitted, there is no basis for modifying the award.

Br. of Resp't at 17; *see generally Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1294-95 (9th cir. 1994) (analyzing whether arbitration clause covered a trade secrets claim). Because the face of the arbitral award alone does not exhibit an erroneous rule of law or mistaken application of law, we do not examine evidence of the parties' intent relating to the scope of arbitration and affirm the trial court on these grounds.

Likewise, we address Chill's additional arguments on issues related to the arbitrators' decision to rescind the $1 million note without reviewing the evidence before the arbitrators and

[7] Neither Matthew Smith Co. nor Chill demanded arbitration of any claim or dispute arising under the $1 million note or any of the other contracts, only the SPA. In fact, Chill filed suit in superior court for alleged breaches of contracts other than the SPA.

we also address his challenge to the trial court's writ of attachment.

C. Contract Language--Integration of Agreements

Chill posits that because the SPA contained an integration clause that stated it "contain[ed] the entire understanding of the parties regarding the subject matter of this Agreement" and because it superseded all previous negotiations and agreements "with respect to the subject of this Agreement," none of the other agreements served as consideration for the SPA itself. CP at 49. Matthew Smith Co. argues that "determining the affect [sic] of an integration clause is for the arbitrators." Br. of Resp't at 18 n.2.

We agree with Matthew Smith Co. that when the effect of the integration clause depends on an analysis of the evidence before the arbitrators, courts are not allowed to review that evidence. *Davidson,* 135 Wn.2d at 119. Here, the arbitrators heard evidence that the parties' intended to obfuscate the amount of money involved in the transaction. One of the ways to do that was to separate the various promissory notes and payments into separate agreements. But *Boyd* held that "[w]hether separate agreements are in fact part of one transaction depends upon the intention of the parties as evidenced by the agreements." 127 Wn.2d at 261 .

Chill also argues that the language of the arbitration clause limits the arbitrators' power to consider the other agreements. Chill relies on *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1463 (9th Cir. 1983) for the proposition that the phrase "arising out of" is narrowly construed to reach only claims arising under the contract itself. Specifically, he argues that it is clear that the parties intended to limit arbitration to claims based on the terms of the SPA because the arbitration clause states it addresses any claim "arising out of" the agreement, as opposed to any claim "arising out of or related to" the agreement. Br. of Appellant at 21.

But as we previously discussed, Matthew Smith Co.'s WSSA claim arises solely under the SPA. It did not seek to arbitrate claims under any other contract. The arbitrators' determination that the other contracts served either as the basis for or the basis to implement the SPA was within the scope of the arbitration clause in the SPA. According to the evidence the arbitrators heard, the consideration paid and the contracts necessary to implement the SPA were integral to the agreement itself. Evaluating the evidence was within the scope of the arbitrators' power, as was the rescission remedy they ordered, based on the evidence.

The trial court erroneously reviewed the evidence at arbitration before agreeing with the arbitrators that the $1 million note was consideration for the stock purchase, "regardless of both parties' collaboration to conceal or disguise the extent of the consideration." CP at 677. But because the arbitrators heard the evidence about the transaction and the various notes and payments, as well as evidence of the parties' intent, we may not review the evidence as Chill suggests.. Chill's argument that the integration clause precluded the arbitrators' finding that the numerous agreements all related to the SPA is unavailing.

D. Adequate Notice

Chill further contends that Matthew Smith Co. failed to give adequate notice that its claim was intended to affect agreements other than the SPA. Matthew Smith Co. responds that the arbitration notice demands rescission of the SPA.

RCW 7.04A.090[8] governs notice of intent to seek arbitration. Here, the June 2007 notice

[8] RCW 7.04A.090(1) states:

> A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by mail certified or registered, return receipt requested and obtained, or by service as authorized for the initiation of a civil action. The notice must describe the nature of the controversy and the remedy

stated that Matthew Smith Co. sought to arbitrate a fraud in the inducement claim and a breach of contract claim. It requested rescission as the remedy on the fraud claim. In October 2007, Matthew Smith Co. notified Chill that it was asserting WSSA violations in the requested arbitration and that it believed the past notice was sufficient to give notice of the WSSA claims. It offered to send an amended notice if Chill objected, which he did not do.

Because rescission contemplates a return to the status quo, the notice to arbitrate necessarily included notice to Chill that he would be required to return the consideration Matthew Smith Co. paid for the stock. This constituted adequate notice to Chill that all possible components of the stock sale were at issue in the arbitration.

E. Waiver of Arbitration

Chill further contends that Matthew Smith Co. waived its right to arbitrate by participating in the superior court action he filed in July 2007. Chill's lawsuit sought damages for Matthew Smith Co.'s failure to pay on the $1 million note and the other SPA-related contracts, but not for breach of the SPA. Matthew Smith Co. answered the lawsuit and asserted counterclaims. Chill repeats his earlier, unsuccessful argument that he did not know that the related agreements, including the $1 million note, were affected by Matthew Smith Co.'s arbitration claim until the panel addressed the scope of the award following arbitration. But Chill's original arbitration brief

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sought.

We note that RCW 7.04A.090(2) requires a party to object to a lack of notice "not later than the commencement of the arbitration hearing." Chill did not do this, although he contends he had no idea that the related agreements were included in the arbitration until the panel addressed the scope of the award.

Further RCW 7.04A.230(1)(f) states that a court may vacate an arbitration award if "[t]he arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding."

includes the $1 million note in the purchase price for the company.

Matthew Smith Co. responds that Chill failed to raise the waiver issue before the arbitration panel. It points out that RCW 7.04A.070(2) and RCW 7.04A230(1)(e)[9] require a party to raise the waiver issue before the arbitrators and maintains that Chill had a duty to raise this objection no later than at the start of the hearing. If Chill had done so, the parties could have clarified their positions on the scope of the arbitration immediately. Consequently, Matthew Smith Co. asserts that Chill waived his argument that Matthew Smith Co.'s answer and responses in the lawsuit waived the right to arbitrate the entirety of the SPA.

"Parties to an arbitration contract may waive that provision, however, and a party does so by failing to invoke the clause when an action is commenced and arbitration has been ignored." *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw, Inc.*, 28 Wn. App. 59, 61, 621 P.2d 791 (1980). Whether a party waived the right to arbitrate is a mixed issue of law and fact. *Lake Wash. Sch. Dist.*, 28 Wn. App. at 62-63. "[A] waiver cannot be found absent conduct inconsistent with any other intention but to forego a known right." *Lake Wash. Sch. Dist* , 28 Wn. App. at 62. Here, the parties proceeded to vigorously prepare for and participate in the arbitration Matthew Smith Co. demanded. In fact, at oral argument, the parties agreed that the lawsuit did not proceed because they focused on the arbitration to its exclusion and then the lawsuit was apparently abandoned following the arbitration award. These actions are entirely inconsistent with Chill's waiver argument and it fails.

Additionally, as Chill repeatedly notes, only the SPA contained an arbitration clause.

[9] RCW 7.04A.230(1)(e) provides that a court may vacate an arbitration award if, "There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing[.]"

Chill's suit did not purport to address a breach of the SPA. Had it done so, and had Matthew Smith Co. answered without raising the pending arbitration, Chill's argument regarding waiver would carry more weight.

F. Entry of Partial Judgment

Chill also contends that the trial court erred in granting judgment on fewer than all claims under CR 54(b), i.e., the trial court did not directly address and resolve his lawsuit against Matthew Smith Co. CR 54(b) provides in part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment.

Chill argues that the trial court erroneously ruled that the arbitrators' award foreclosed Chill's claims for breach of contracts other than the SPA.

We review entry of judgment under CR 54(b) for abuse of discretion. *Loeffelholz v. Citizens for Leaders With Ethics and Accountability Now* (C.L.E.A.N.), 119 Wn. App. 665, 694, 82 P.3d 1199 (2004). A trial court's decision not to limit its review of the arbitrators' award is not a per se abuse of discretion, particularly when the benefits of a decision resolving an entire dispute "(1) . . . offset judgments favorable to each side before any enforcement activity takes place; (2) . . . preclude the disruptive effects of enforcement and appellate activity while trial court proceedings are still ongoing; and (3) . . . avoid a multiplicity of appeals." *Loeffelholz*, 119 Wn. App. at 694.

Chill argued in response to Matthew Smith Co.'s motion to confirm the arbitrators' award

that his pending action, if successful, would create an offset to the arbitration award. He maintained that Matthew Smith Co. was seeking a de facto consolidation of its action to confirm the arbitration award and Chill's action. He relied on *Fluor Enterprises, Inc. v. Walter Construction*, *Ltd.*, 141 Wn. App. 761, 770, 172 P.3d 368 (2007), in which Division One of this court disapproved of entry of partial judgment in a consolidated action involving an arbitration award.

But here, Matthew Smith Co. did not seek consolidation of Chill's claims in arbitration or in the trial court. The trial court did not issue an order consolidating the claims. The trial court confirmed the arbitration award and entered "Findings and Conclusions On Entry of Judgment Without Delay." CP at 705 (emphasis omitted). It recited that there was no just reason for delaying entry of judgment because (1) the contracts underlying Chill's lawsuit had been cancelled and (2) there was evidence that Chill had left the jurisdiction and was attempting to relocate assets subject to the judgment. The trial court clearly understood that the arbitration award encompassed all agreements signed between Matthew Smith Co. and Chill as part of the stock purchase. It stated that the award included rescission of both the $1 million note and "other contracts" that served as consideration. CP at 702.

The trial court did not abuse its discretion under CR 54(b). The contracts between the two parties were nullified, thus requiring that they be returned to their pre-agreement status. Chill's claims for breach of contracts other than the stock purchase agreement were no longer viable. There was no just reason for delay in entering a full and final judgment returning the parties to the status quo before the SPA.

II. Writ of Attachment

Chill also contends that the writ of attachment on his one half interest in marital property was based on a "mistaken belief that the arbitration award represented liability for a tort." Br. of Appellant at 34-35. Chill first argues that "[c]ommunity property cannot be reached to satisfy debts related to stock that is separate property." Br. of Appellant at 36. Chill next contends that Matthew Smith Co.'s claim is not a tort claim because Matthew Smith Co. obtained relief under RCW 21.20.430(1), the WSSA, and it is recognized that relief under this act is not characterized as tort recovery. He primarily contends that rescission allowed under the WSSA requires no proof of causation, an essential element of any tort claim. We disagree.

A. Standard of Review

The nature and legal effect of a judgment is a question of law. *Callan v. Callan*, 2 Wn. App. 446, 448, 468 P.2d 456 (1970). We review legal issues de novo. *Bainbridge Citizens United v. Dep't of Natural Resources*, 147 Wn. App. 365, 371, 198 P.3d 1033 (2008). We review whether property is separate or community de novo. *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002).

B. Fraud Is a Tort Allowing Recovery Against Community Property Interests

Community property cannot be garnished to satisfy the separate debt of one spouse. Former RCW 26.16.200 (1983). But if a marriage partner commits a tort, his or her one half interest in the community property may be reached to satisfy a tort judgment. *See deElche v. Jacobsen*, 95 Wn.2d 237, 246, 622 P.2d 835 (1980); *see also Keene v. Edie*, 131 Wn.2d 822, 834-35, 935 P.2d 588 (1997).

1. Debts and Community Property

Chill relies on *First National Bank of Juneau v. Estus*, 185 Wash. 174, 52 P.2d 1243

(1936) and *Achilles v. Hoopes*, 40 Wn.2d 664, 245 P.2d 1005 (1952) in arguing that the arbitration award is a separate "debt" that cannot be satisfied by reaching community property. In *Estus*, a bank sued a husband and wife to recover sums paid under two promissory notes the husband had signed. 185 Wash. at 175. The trial court refused to attach community property to satisfy one of the notes but it allowed community property to be used to satisfy the debt on the other note. Both parties appealed. Our Supreme Court ruled that the notes were related to the stock and operations of a separate cannery business and that community property was exempt from any action to recover payment on the notes only the husband signed. *Estus*, 185 Wash. at 178-79.

In *Achilles*, the husband executed a note to pay for a stock subscription to a corporation that he formed with the plaintiff, who held the note. The note holder eventually sued to collect on the note. *Achilles*, 40 Wn.2d at 664-65. The court held that the governing law created no community obligation; thus, "[b]eing inherently the separate obligation of the husband when created[,] it retains that character . . . . Recovery cannot be had against the community for the separate obligation of the spouse." *Achilles*, 40 Wn.2d at 666.

Here, had the arbitration award arisen from a dispute over nonpayment on one of the promissory notes, the cases Chill cited might prevent attachment of community property, depending on whether the community benefitted from the notes. For example, Matthew Smith Co. does not dispute that the stock in Charles Prescott Restoration was Chill's separate property. But Matthew Smith Co. did not seek arbitration based on nonpayment of a note Chill signed as his separate obligation, as in *Achilles*. Matthew Smith Co. sought to recover for WSSA violations by Chill under the SPA. Therefore, Matthew Smith Co. did not sue to recover Chill's

unpaid debt. *See generally Haley v. Highland*, 142 Wn.2d 135, 145, 12 P.3d 119 (2000) (characterizing the award of damages for a WSSA violation as a liability rather than a debt); *Caplan v. Sullivan*, 37 Wn. App. 289, 293, 679 P.2d 949 (1984) (holding that an unliquidated tort claim is not a debt). Consequently, *Estus* and *Achilles* do not bar recovery against community property based on Chill's separate interest in Charles Prescott Restoration.

2. Tort Recovery

Because the arbitration award is not based on breach of a promissory note signed solely by Chill and arising from a separate obligation, Matthew Smith Co. may recover against Chill's one half interest in community property, if the award represents recovery in tort. *deElche*, 95 Wn.2d at 246. Matthew Smith Co. relies on *Haley* to support its position that a violation of the WSSA is a tort. 142 Wn.2d at 142-43.

In *Haley*, an arbitrator awarded Haley $2,500 for Highland's violations of the WSSA. 142 Wn.2d at 139. On appeal, our Supreme Court stated, "The principal issue presented by this case is whether the judgment against Highland, a married person, for tortious conduct that occurred before his marriage may be enforced against his one-half interest in community personal property if his separate property is insufficient to satisfy the claim." *Haley*, 142 Wn.2d at 142. Throughout the opinion, the court characterized the judgment against Highland as one for tortious conduct and labeled Highland a "tortfeasor." *Haley*, 142 Wn.2d at 148-49.

> We affirm the Court of Appeals by holding that RCW 26.16.200[10] does not bar the use of Highland's community property to satisfy a judgment based on

[10]The present version of RCW 26.16.200 states, in part:

> Neither person in a marriage or state registered domestic partnership is liable for the debts or liabilities of the other incurred before marriage or state registered domestic partnership, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other[.]

> his premarital tort. We further hold that this case is governed by *deElche* and *Keene*, permitting the use of Highland's one-half interest in community personal property to satisfy his separate tort obligation if his separate property is insufficient to satisfy the claim.

Haley, 142 Wn.2d at 152.

Chill argues that neither party disputed that the WSSA violation was a tort in *Haley v. Highland*, 92 Wn. App. 48, 50, 960 P.2d 962 (1998), *aff'd in part, rev'd in part*, 142 Wn.2d 135 (2000). Thus, he argues, the Supreme Court's characterization of the liability is not binding. Chill is correct that the parties in *Haley* agreed about the status of the claim. But whether the WSSA claim was a tort was germane to the resolution of the case because, if the claim not been a tort, it would not have been within reach of the judgment creditor. Thus, the portion of the opinion referring to the conduct as a tort was necessary "to the conclusion reached." *State ex rel. Todd v. Yelle*, 7 Wn.2d 443, 451, 110 P.2d 162 (1941).

It is also evident that our Supreme Court determined that the claim was one based on tort liability, not only because it classified the claim as a tort, but also because it characterized the claim as a community (as opposed to separate) tort.

> In this case, Highland's securities fraud violation is not a separate tort because of the nature of his conduct. Rather, it is separate because he was unmarried during the period when his tortious activity occurred. We believe there is no policy justification for treating these two circumstances differently.

Haley, 142 Wn.2d at 143 (analyzing the type of tort at issue). Consequently, we hold that *Haley* resolves the issue Chill raises and his numerous arguments that violations of the WSSA are not torts fail.

III. Third Party Rights and Writ of Attachment

Chill argues that the writ of attachment on co-owned and community property violated the co-owner's due process rights. He states that the writ of attachment does not specify that the attachment applies to only Chill's one half interest in the properties. Matthew Smith Co. responds that although the writ does not have this limitation, the order entered authorizing the writ of attachment limits the writ to Chill's one half interest. The order states, "As to these parcels, the writ shall apply only to Donald Chill's undivided one-half interest." CP at 679. Matthew Smith Co. seeks to attach only Chill's one half interest in the properties. And at oral argument Chill clarified that he has not asked the trial court to correct any claimed error in the writ.

Our review of the documents indicates that the trial court's intent was clear and that the writ attaches only to Chill's interests. Moreover, even if unclear, RCW 6.17.170[11] instructs that a writ on co-owned property can only reach the debtor's interest in the property. Chill's due process argument fails.

IV. Attorney Fees

Chill and Matthew Smith Co. both request attorney fees. Both rely on section 19.16 of the SPA, which authorizes an award of fees and costs to any party who prevails in a suit arising out of the stock purchase agreement. Upon compliance with RAP 18.1(d), Matthew Smith Co., as the prevailing party, should be awarded fees and costs by our commissioner.

We affirm the arbitration award and the writ of attachment. We also award fees and costs

[11] RCW 6.17.170 provides:

> If a judgment debtor owns real estate jointly or in common with any other person, only the debtor's interest may be levied on and sold on execution, and the sheriff's notice of sale shall describe the extent of the debtor's interest to be sold as accurately as possible.

to Matthew Smith Co.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Armstrong, J.

Hunt, J.